



Reasons for decision

General Longshore Workers, Checkers, and Shipliners of the Port of Saint John, N.B., Local 273 of the International Longshoremen's Association,

applicant,

and

Tropical Shipping of Canada, LLC,

employer,

Board File: 30056-C

Neutral Citation: 2014 CIRB 720

April 15, 2014

The Canada Industrial Relations Board (the Board) was composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. Daniel Charbonneau and Robert Monette, Members. A hearing was held in Saint John, New Brunswick on April 1 and 2, 2014.

Appearances

Mr. David A. Mombourquette, for the General Longshore Workers, Checkers, and Shipliners of the Port of Saint John, N.B., Local 273 of the International Longshoremen's Association;

Mr. Jamie C. Eddy, for Tropical Shipping of Canada, LLC.

I. Nature of the Application

[1] On July 10, 2013, the General Longshore Workers, Checkers, and Shipliners of the Port of Saint John, N.B., Local 273 of the International Longshoremen's Association (ILA 273 or

Canada

the union) applied to the Board for certification as bargaining agent for a unit of welders and refrigeration mechanics employed by Tropical Shipping of Canada, LLC (Tropical Canada or the employer). The employer objected to the Board's jurisdiction to deal with the application, and in the alternative, to the composition of the proposed bargaining unit.

[2] The Board held an oral hearing to obtain evidence as to the functions performed by Tropical Canada and the members of the proposed bargaining unit, to enable it to determine whether the employer's activities constitute a federal work, undertaking or business in their own right, or are integral to a federal work, undertaking or business, such that the *Canada Labour Code (Part I-Industrial Relations)* (the *Code*) applies to those activities.

II. Facts

[3] Tropical Canada is a cargo agent incorporated in Delaware, USA and is registered with the province of New Brunswick as an extra-provincial corporation. It is a subsidiary of Tropical Shipping and Construction Company Limited (Tropical), a Bahamian corporation that specializes in the shipment of containerized cargo to and from the United States and Canada and the Bahamas and Caribbean. Tropical operates, but does not own, two vessels that call at the Port of Saint John, the Berra K and the AHS Hamburg.

[4] The head office of Tropical is located in West Palm Beach, Florida. Tropical Canada employees in Saint John participate in quarterly teleconference meetings involving all Tropical staff, which are led by the President of Tropical. Tropical Canada staff submit their time sheets and leave and training requests to West Palm Beach. There are no human resources or payroll staff in Saint John; all issues are dealt with by staff in the West Palm Beach headquarters. Tropical Canada obtains its informatics, human resources, financial/accounting, payroll and training services, operational manuals and marketing materials from Tropical and the two companies share a computer system. However, Tropical Canada maintains its own health care and pension plan for employees in Canada.

[5] Pursuant to an Agency Agreement, Tropical Canada acts as the agent of Tropical in Canada. It markets Tropical's services in Canada, makes certain that cargo received in and shipped from the Port of Saint John, New Brunswick is loaded and unloaded on Tropical's vessels in order to

arrive at the appropriate customer destinations domestically and abroad. Tropical Canada has contracted with Logistec, a stevedoring company, for the longshoring functions associated with the loading and unloading of containers on the Tropical vessels. Logistec and its subsidiary, BII Terminals, operate the container handling terminal in the Port of Saint John.

[6] Under its Agency Agreement, Tropical Canada acts as the exclusive cargo agent for Tropical in Canada, with full authority to solicit and book cargoes, issue and sign bills of lading, collect and remit freight, demurrage, storage, terminal and other charges due and payable on container equipment and/or cargo, process claims and generally perform all acts and functions customarily performed by cargo agents.

[7] For the purpose of carrying out its responsibilities under the Agency Agreement, Tropical Canada employs sales staff, customer service representatives, documentation specialists and a pricing analyst, who work in an office building located outside the entrance to the Port of Saint John.

[8] In addition to the functions set out in its Agency Agreement with Tropical, Tropical Canada operates a container maintenance and repair service at the terminal. This aspect of the operation consists of a terminal manager, a welder repair supervisor, a refrigeration maintenance supervisor, two logistics coordinators, two welders and two refrigeration technicians. Tropical Canada acquired this operation from Kent Line, a division of Irving Transportation Services Group, in approximately 2002. It is this group of employees that is the subject of ILA 273's application for certification.

[9] Tropical Canada deals with both refrigerated and non-refrigerated containers, which are owned or leased by Tropical and provided to Tropical customers for their use. Tropical Canada's container maintenance and repair operations normally operate Monday to Friday, although overtime may be required to ensure that a sufficient number of seaworthy containers are available.

[10] Containers are off-loaded from the vessel by the longshoremen and taken to a lay down area on the terminal. Here they are inspected by the welder repair supervisor for damage or problems with the refrigeration unit. Longshoremen move the refrigerated containers (reefers) to the reefer shop (truss building) for repair. The priority for the Tropical Canada employees is to repair reefers that are scheduled to sail. Once the vessel has left, the welders and mechanics perform maintenance and repairs on the containers left at the terminal.

[11] After the containers are cleaned and repaired, they may be sent out to customers by rail or truck. On occasion, a reefer that has been loaded onto a vessel may be found to be in need of on-the-spot repairs. In this instance, if the ship's electrician cannot effect the repairs, the Tropical Canada refrigeration mechanic will go on board the vessel to do the necessary work or to deliver parts. Consequently, a refrigeration mechanic must be on site on the day that the vessel sails, in order to deal with any problems that may arise. The refrigeration maintenance supervisor goes on board the vessel each time it calls at the Port of Saint John, to deliver parts and items from Tropical's West Palm Beach headquarters.

[12] The Tropical Canada refrigeration mechanics also maintain and repair the clip-on generators that can be attached to a container. The actual installation and removal of clip-on generators is done by members of the ILA.

[13] The Tropical Canada employees do not handle any cargo, nor do they transport or clean the containers. That work is done by ILA members employed by Logistec. The primary responsibility of the Tropical Canada employees working at the terminal in the Port of Saint John is to repair containers that have been identified as requiring work. This includes repairing the clip-on mounts used to attach the clip-on generator to the container, and plugging and unplugging containers from a CN generator that is used when the containers are transported by rail. The welders also maintain and repair the flat racks, which are used to move loads that are too large to fit in a container. They prepare the materials that the longshoremen need to secure the load on a vessel and deliver them to the dock or retain them at the truss building for pick-up by a longshoreman.

[14] Tropical vessels also call at ports located in or near Toronto, Ontario and Montréal, Quebec. In those locations, Tropical Canada contracts with a third party for the maintenance and repair of Tropical's containers as well as other services.

III. Positions of the Parties

A. The Applicant

[15] The union submits that Tropical Canada should be found to be within federal jurisdiction, as it is the exclusive cargo agent for Tropical in Canada pursuant to its Agency Agreement with that company. It suggests that Tropical Canada is actively engaged in shipping, as it arranges for transportation of the containers to and from the Port and contracts for the longshoring services that are necessary to load and unload those containers from Tropical's vessels. Tropical Canada is the sole conduit through which cargo is placed on and taken off the vessels.

[16] In the alternative, ILA 273 asserts that Tropical Canada is integral to the operation of a federally regulated undertaking. As a vessel operator, Tropical is engaged in marine transportation and is therefore within federal jurisdiction for labour relations purposes. It argues that the work that Tropical Canada performs on behalf of Tropical is integral to the operation of the parent company, such that Tropical could not operate its shipping business without Tropical Canada's work. The corporate relationship and integration between the two companies is significant and they use the same logo.

[17] ILA 273 argues that Tropical Canada is not independent of Tropical, and notes that the President of Tropical Canada, Mr. Richard Murrell, is also the Chief Executive Officer of Tropical. The Assistant Vice-President, Canada, Hispaniola and U.S. Virgin Islands, Mr. Gordon Cole, is also an officer of Tropical. Mr. Cole is also a Director of the Port of Saint John Employers Association Inc. (PSJEA), which is the association accredited by the Board pursuant to section 34 of the *Code* as the representative for all employers engaged in longshoring in the Port of Saint John.

[18] The union alleges that Tropical Canada contracts with the Canadian National Railway Company (CN) and trucking companies such as Midland to deliver containers to the Port of Saint John and to pick up and deliver containers to customers. It argues that, as Tropical

Canada arranges the transport of cargo from customers to the Port of Saint John for loading onto Tropical's vessels by longshoremen it engages to perform this work. Tropical Canada is integral and essential to Tropical's operations.

[19] The union asserts that the welders and refrigeration mechanics employed by Tropical Canada work alongside the longshoremen and are an essential part of the link that supports Tropical's business. It contends that there is both common management and functional integration of the work of Tropical and Tropical Canada. Tropical Canada ensures that the containers are ready and fit to be loaded onto the vessel and Tropical Canada employees make the determination as to what containers are loaded on the vessel.

[20] The union also points out that Tropical Canada has accepted the jurisdiction of the Labour Canada safety officers, and has posted a copy of Part II of the *Canada Labour Code (Occupational Health and Safety)* and the associated regulations in the workplace, as required by that statute. It suggests that, since Tropical Canada employees work alongside longshoremen, there is a potential for conflict of jurisdiction should a hazard exist at the terminal and both groups are not under the same regime.

[21] The union relies on *Rivtow Marine Ltd. and Tiger Tugz Inc.*, 1999 CIRB 30 (*Rivtow Marine*), and *Kindersley Transport Ltd. and Quill Transport Ltd.*, 2008 CIRB 409 (*Kindersley*), both cases in which the Board found that an intra-provincial operation was within federal jurisdiction because it was vital and integral to a federal undertaking.

[22] The union asserts that there is sufficient evidence for the Board to conclude, on a balance of probability, that Tropical Canada is acting for Tropical until such time as the containers are loaded on the vessels. It is Tropical Canada that retains Logistec to perform longshoring operations on behalf of Tropical, and there is more than ample evidence to conclude that the two companies are totally integrated.

[23] The union distinguishes the cases relied on by the employer, as dealing with static situations, whereas in this case, Tropical Canada employees are involved at every stage of the activities that take place in the Port of Saint John; Tropical Canada employees are an integral part of the chain of Tropical's continuous operation.

B. The Employer

[24] The employer states that there is a presumption of provincial jurisdiction over labour relations and that federal jurisdiction is the exception. It submits that the union has not met the evidentiary burden of proving that Tropical Canada is engaged in shipping and navigation, or that Tropical Canada is vital, essential or integral to Tropical's federally regulated activities.

[25] The employer distinguishes the cases relied on by the union. It suggests that *Rivtow Marine, supra* and *Kindersley, supra*, dealt with an application for a declaration of single employer under section 35 of the *Code*, which is not the situation in this case. In any event, the test is not whether Tropical Canada's operations are integrated into a continuous operation, but whether they are vital, essential or integral to a federal undertaking.

[26] The employer suggests that there are no facts before the Board that are capable of supporting a conclusion that Tropical Canada is in federal jurisdiction, merely assumptions and speculation by the union. The facts that are on the record demonstrate that Tropical Canada does not own the Berra K or the AHS Hamburg. There is no evidence as to the charter arrangement that exists with respect to these vessels and no evidence that Tropical Canada plays any role in the maintenance or repair of the vessels themselves. There is also no evidence that Tropical Canada is a wholly-owned subsidiary of Tropical or as to the degree of ownership that Tropical has in Tropical Canada.

[27] The employer suggests that Tropical Canada is far removed from any involvement in shipping or navigation. All of the work related to shipping, such as docking and unloading the vessel, transporting the containers and placing them on the dock and moving them to specified areas of the terminal are performed by Logistec employees, not those of Tropical Canada. There is also no evidence that Tropical Canada owns or leases any of the containers that it repairs and maintains.

[28] Tropical Canada asserts that it has no exclusivity over the repair and maintenance of the containers; similar work is done by others in Toronto, Montréal and West Palm Beach, and on occasion by another third-party service provider in Saint John. The employer also points out that the repair and maintenance of containers is not referenced in the Agency Agreement between Tropical and Tropical Canada.

[29] Tropical Canada suggests that its activities are similar to those of a freight forwarding company, such as that considered by the Supreme Court of Canada in *Consolidated FastFrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53. Tropical Canada is not a carrier, it does not operate the vessel, it is not a shipper, and it is not directly involved in the loading or unloading of cargo on the vessels. Tropical Canada suggests that the activities of shipping and navigation have ended at the point in time when it receives the containers for maintenance and repair.

[30] Tropical Canada also argues that there is no evidence that the maintenance and repair of containers is vital, essential or integral to a core federal undertaking. In any event, it asserts, the maintenance and repair of containers is unrelated to the operation of the vessel. Furthermore, Tropical Canada is an independent operation, separate from Tropical and there is no evidence of any interdependence or that Tropical relies on Tropical Canada in any way. The employer cited *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry v. KMT Technical Services*, [1993] OLRB Rep. April 344, for the proposition that a company engaged in ship maintenance and repair is in provincial jurisdiction. It also relies on *Syndicat des débardeurs du Port de Québec (CUPE, Local 2614) v. Société des Arrimeurs de Québec Inc.*, 2011 FCA 17, in which the Federal Court of Appeal upheld a decision of the Board finding that the activities of an electrical company specializing in instrumentation, automated systems and electrical and mechanical maintenance work in the Port of Quebec, Cribtec, was not in federal jurisdiction, despite the fact that it performed work for a federally regulated longshoring company, St. Lawrence Stevedoring.

IV. Analysis and Decision

[31] It is well established that labour relations generally fall within the exclusive jurisdiction of the provinces by virtue of section 92(13) of the *Constitution Act, 1867, 30 & 31 Victoria, c.3 (U.K.) (Constitution Act, 1867)*, being a matter of “Property and Civil Rights in the Province” (*Toronto Electric Commissioners v. Snider et al.*, [1925] 2 D.L.R. 5. Parliament may only assert exclusive jurisdiction over the labour relations of a work or undertaking if the entity is found to be within federal jurisdiction (*Reference re: Industrial Relations and Disputes Investigation Act (Canada)*, [1955] S.C.R. 529 (the Stevedores’ Reference); and *Quebec (Minimum Wage Commission) v. Construction Montcalm Inc.*, [1979] 1 S.C.R. 754). Each case turns on its own specific facts (*Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, [1989] 2 S.C.R. 225.

[32] There are essentially two ways in which an entity may be found to fall within federal jurisdiction for labour relations purposes. First, it may constitute a federal undertaking if it carries on activities that are within the exclusive competence of Parliament under section 91 or 92(10) of the *Constitution Act, 1867* (direct federal jurisdiction). Secondly, if it is not a federal undertaking, it may still fall under federal jurisdiction if its activities are vital, essential or integral to a core federal undertaking (derivative jurisdiction—see *United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112; *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees’ Union*, 2010 SCC 45 (NIL/TU,O); and *Tessier Ltée v. Québec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23 (Tessier)).

[33] Parliament’s exclusive jurisdiction over certain undertakings is reflected in the definition of “federal work, undertaking or business”, set out at section 2 of the *Code*. For the purposes of the current matter, only the first three paragraphs of that section are relevant:

2. In this Act,

“federal work, undertaking or business” means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

(a) a work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada,

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province;

(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province;

...

[34] Neither party to this proceeding argued that the parent company, Tropical, was not within federal jurisdiction. As a business carried on in connection with maritime shipping, Tropical's activities in Canada are subject to federal jurisdiction.

[35] However, Tropical has interposed a subsidiary operation, Tropical Canada, to act as its agent and manage certain aspects of its Canadian business. Pursuant to an Agency Agreement between the two entities, Tropical Canada carries on a number of activities. Outside of that Agreement, Tropical Canada also provides a container maintenance and repair service.

[36] Because the employer decided that it would not call any witnesses, the evidence before the Board regarding Tropical Canada's operations as a cargo agent is very limited. It was admitted that, in its role as the exclusive cargo agent for Tropical, Tropical Canada retains Logistec to provide the longshoring activities required for the loading and unloading of the vessels and movement of the containers within the terminal. In the Board's view, the evidence before it regarding the functions that Tropical Canada performs for Tropical under their Agency Agreement is insufficient for the Board to conduct an analysis and reach any conclusion regarding the question of whether Tropical Canada, as a cargo agent, is within federal or provincial legislation for labour relations purposes.

[37] However, in the Board's view, it is not necessary for it to reach a conclusion as to the constitutional status of Tropical Canada in order to decide this matter. The evidence that was provided to the Board is sufficient to persuade the Board that the activities related to the maintenance and repair of containers are severable from Tropical Canada's activities as a cargo agent under its Agency Agreement with Tropical.

[38] It is not exceptional or unusual to find that a company is in different constitutional jurisdictions with respect to its various operations. For example, in *Northern Telecom v. Communications Workers*, [1980] 1 S.C.R. 115 (*Northern Telecom*), the employer was primarily

engaged in manufacturing telecommunications equipment, but the portion of its business relating to the installation of that equipment for customers of Bell Canada was found to fall within federal jurisdiction. In *J.C. Fibres Inc.* (1994), 94 d1 (CLRB no. 1057), the Canada Labour Relations Board (CLRB) found that the road transportation portion of the employer's business fell under federal jurisdiction while its paper recovery and recycling operations were severable and purely local in nature, thus falling under provincial jurisdiction. Similarly, in *Cargill Grain Co., Gagnon and Boucher Division v. International Longshoremen's Assn., Local 1739*, [1983], 51 N.R. 182 (F.C.A.) (*Cargill Grain Co.*), the Federal Court of Appeal found that, although the employer's grain handling operations fell within federal jurisdiction, employees engaged in maintaining and operating the equipment that moved the grain to silos for weighing and storage and ultimately onto customers' trucks were not engaged in work that fell within federal jurisdiction.

[39] In the Board's view, the repair and maintenance of containers, while an important function, is not sufficiently related to navigation and shipping as to allow the Board to assert jurisdiction over this aspect of Tropical Canada's operations. As the Federal Court of Appeal stated in *Cargill Grain Co., supra*:

26. ...Because operations of sorting, handling and storing goods can be an incidental part of transport by sea, it does not follow that all operations of sorting, handling and storing goods, even on a wharf, are necessarily a part of such transport. In my view, operations of this type are an incidental part of longshoring, and as such connected with the transport itself, when they are actually necessary in order to complete the transport operation and ensure that the goods are delivered to their recipient.

...

(emphasis added)

[40] The maintenance and repair of containers is several steps removed from the activity of navigation and shipping. Although the use of containers to transport goods has become commonplace, containerization is not the sole means by which cargo is transported at sea. Since the use of containers is not a necessary characteristic of shipping and navigation, the Board must conclude that there is no direct federal jurisdiction over the maintenance and repair of these containers.

[41] With respect to the derivative jurisdiction, the relevant factors in determining whether an otherwise presumptively provincial enterprise providing services to a federal undertaking forms a vital, essential or integral part of the federal undertaking were identified in *Northern Telecom, supra*:

- a) the general nature of the service provider's operation as a going concern and, in particular, the role of the services within that operation;
- b) the nature of the corporate relationship between the service provider and the other companies that it serves, notably the federal undertaking at issue;
- c) the importance of the work done for the federal undertaking at issue as compared with other customers of the service provider; and
- d) the physical and operational connection between the services provided and the federal undertaking at issue and, in particular, the extent of these services in the operation of the federal undertaking as a whole.

[42] The Board understands that the maintenance and repair function ensures that the containers are seaworthy and capable of preserving the contents in a fit state until they reach their destination. While this is obviously important to the shippers, and potentially integral to their businesses, there was no evidence before the Board to allow it to conclude that the ability to provide serviceable containers is essential to Tropical's business.

[43] There is also no evidence that the maintenance and repair function is a necessary aspect of Tropical Canada's primary activity as the Canadian cargo agent for Tropical. Even if there had been sufficient evidence to conclude that Tropical Canada's activities as a cargo agent bring it into federal jurisdiction, there is no requirement in law or contract that the maintenance and repair function be performed by the cargo agent itself. While there appears to be a close corporate relationship between Tropical Canada and Tropical, the latter is not dependent on the former for container maintenance and repair. Both in the Port of Saint John and other ports served by Tropical vessels, the repair and maintenance of containers is performed by third parties. The obligation to repair and maintain Tropical's containers does not form part of the Agency Agreement between the parties; it appears to be an ancillary aspect of the relationship between the two entities.

[44] Taking all of these factors into account, the Board is unable to find that Tropical Canada's container maintenance and repair activities are so vital, essential or integral to Tropical's shipping activities as to invoke the Board's derivative jurisdiction.

[45] Consequently, the Board finds that it has no jurisdiction to entertain the union's application for certification and it is hereby dismissed.

[46] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Robert Monette
Member

Daniel Charbonneau
Member